United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1040

To Be Argued By
BENJAMIN J. GOLUB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 75-1040

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

DANIEL JORDANO, ANTHONY JORDAN,
a/k/a ANDREW JORDANO, ANTHONY
MAFFUCCI,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT ANDREW JORDAN

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686-4300

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PRELIMINARY STATEMENT

ANDREW JORDAN ("JORDAN") appeals from a judgment of conviction entered on December 14, 1974 in the United States District Court for the Southern District of New York, after a six day trial before the Hon. Robert L Carter, United States District Judge, and a jury.

Indictment S74 Cr. 764 (RLC), charged JORDAN and co-defendants DANIEL JORDANO ("JORDANO"), who is JORDAN's brother, ANTHONY MAFFUCCI ("MAFFUCCI"), who is JORDAN's

wife's uncle and CHARLES HODGES with three counts. The first count of the indictment was that JORDAN and the others conspired to rob the Yonkers Savings Bank, Yonkers, New York; counts two and three charged JORDAN, and the others, with the actual robbery. Title 18, United States Code, §§371, 2113(a) amd 2, 2113(b) and 2.

The indictment was a redacted indictment. The original indictment also named as a co-defendant, one RONALD CORBIA, an employee of the Yonkers Savings Bank, in each of the three counts plus an additional count (which also named JORDAN, JORDANO, MAFFUCCI and HODGES) of willfully misapplying bank funds. Title 18, United States Code, §§656 and 2.

The charges contained in the original indictment were initially tried before Judge Carter, and a jury, in a nine day trial. That trial ended with an acquittal of all defendants (except HODGES, who had, prior to the first trial, pleaded guilty to the first, that is the conspiracy count in the indictment and became a Government witness) on count four (which has been redacted from the instant indictment); the acquittal of CORBIA on counts one, two and three and the jury being "hung" with respect to JORDAN, JORDANO and MAFFUCCI on counts one, two and three. This resulted in the instant new trial and judgment of conviction, which is being appealed by this appeal.

II. THE FACTS

On September 21, 1973 CHARLES HODGES ("HODGES") and KENNETH WILLIAMS ("WILLIAMS"), jumped a bank guard and, depending on which trial record you read, a bank employee, (RONALD CORBIA), on Yonkers Avenue, Yonkers, New York. [R.-43]. HODGES testified at the first trial that CORBIA was "down with" (i.e., a party to) the robbery and that he dropped the bag containing the money into HODGES' hands which HODGES caught. At the second trial HODGES testified that he "grabbed" [R.233) the bag from CORBIA. At the second trial, there was no mention whatsoever that CORBIA had participated in the robbery or the conspiracy.

The bank bag in question was used to transport cash from the National Bank of North America in Yonkers to the Yonkers Savings Bank at 801 Yonkers Avenue, Yonkers, New York [R.51]. It was a normal procedure for the bank to transport money in this fashion several times a week. [R.-51] There was also testimony that it was obvious to any person walking on Yonkers Avenue that money was being transported in a bank bag [R-53]. There was no attempt to hide the fact that money was being transported.

On the morning of the robbery WILLIAMS grappled with the bank guard and was apprehended on the scene. HODGES fled down the alley way with the bag of money and escaped

[R.-84). HODGES, in a manner that was unknown throughout both trials was later apprehended while in jail on another charge.

Both HODGES and WILLIAMS have extensive criminal records. WILLIAMS has among other things a conviction for attempted murder, and pleaded guilty to one count in the robbery which is the subject of this indictment.

HODGES, and thereafter WILLIAMS, (but not before he was held in contempt by the Grand Jury and again after perjuring himself before the Grand Jury) told a bizzare and outrageous tale of having been approached by JORDANO and MUFFUCCI, who "hired" them to commit the robbery. They later met JORDAN. The plan for this robbery was replete with getaway cars, look-out cars which were to ram the police cars, all night meetings prior to the robbery and finally, HODGES incredible story of leaving $36,000.00 with JORDANO, taking only $10.00 for himself and never seeing JORDANO again until the trial. [R.-85].

Also called to testify by the Government was NANCY WILLIS (hereinafter "WILLIS"), who on her direct testimony by the U.S. Attorney, denied that her boyfriend, JORDANO, had ever mentioned any bank messenger or robbery of any bank. At both trials the Government claimed surprise at this testimony; declared her a hostile witness and cross-examined and impeached her with her own Grand Jury testimony in which

she stated that she had heard her boyfriend discussing a bank messenger in the White Bridge Bar in Yonkers when JORDAN and MAFFUCCI were present. The Government then called, in addition, to impeach WILLIS' testimony, albeit with a limiting instruction, Special Agent LOUIS HAHN of the Federal Bureau of Investigation (hereinafter "Agent Hahn") and a Yorktown Heights Detective named EDGAR FIELDING (hereinafter "Detective Fielding") who both testified, in the case of HAHN, that JORDANO "was responsible for setting up the robbery of Yonkers Savings Bank" [R.-397] and in the case of FIELDING that JORDANO was "involved" in the robbery of the Yonkers Savings Bank [R.-411].

Appellant JORDAN, an operating engineer, testified in his own behalf; he denied any part in the robbery; he denied knowing WILLIAMS; he admitted to having seen HODGES, whom JORDAN believed worked as a helper for a furniture mover who moved furniture at premises of a corporation for which JORDAN had been employed as an officer and principal, together with his brother, JORDANO, and MAFFUCCI, both of whom he testified, his relationship was "close" [R.-746].

JORDAN denied being at a meeting with HODGES and WILLIAMS on the night prior to the robbery stating that he was at work on that evening. Prior to his testimony, three employees of SLATERY CONSTRUCTION COMPANY (a foreman, and the operating engineers who worked the shift before and after JORDAN's)

testified that JORDAN had been working on the evening prior to the robbery when HODGES and WILLIAMS placed him at a meeting at Yonkers; JORDAN further testified that on the morning of the alleged robbery he had gone to a junkyard in Yonkers to fix the radiator in his wife's automobile [R.-709]. His wife corroborated this testimony. A copy of the bill given to JORDAN by the junkyard was offerred into evidence but was not admitted into evidence [R.-658-9, 709, 717-18).

The first trial commenced on November 4, 1974 and concluded on November 15, 1974. The jury went out to deliberate on Friday morning, deliberated the entire balance of the day, resumed deliberation on Saturday morning at 10:00 A.M. and at approximately 3:00 P.M. Judge Carter found that the jury was "hung" with respect to the defendants JORDAN, JORDANO and MUFFUCCI as set forth above.

The second trial commenced on December 9, 1974 and concluded on December 14, 1974. In the second trial, the jury deliberations were somewhat, but not significantly shorter. On January 28, 1975 JORDAN was sentenced to a five year term of imprisonment on each count to run concurrently. He is presently on bail pending the outcome of this appeal.

ISSUES PRESENTED

I. IS IT REVERSIBLE ERROR TO HAVE ALLOWED THE GOVERNMENT TO IMPEACH ITS OWN WITNESS IN THE MANNER DONE IN THE SECOND TRIAL?

II. IS IT REVERSIBLE ERROR TO HAVE REFUSED TO ALLOW INTO EVIDENCE THE COPY OF THE BILL RECEIVED BY JORDAN AT THE JUNKYARD WHERE THE RADIATOR WAS REPAIRED?

ARGUMENT

POINT I

THE ALLOWANCE OF THE IMPEACHMENT OF THE TESTIMONY OF WILLIS, THE GOVERNMENT'S OWN WITNESS, BY HAVING HER DECLARED HOSTILE AND THEREAFTER INTRODUCING HER GRAND JURY TESTIMONY AND TESTIMONY FROM AGENT HAHN AND DETECTIVE FIELDING WAS REVERSIBLE ERROR.

Even a cursory reading of the record indicates the importance of the manner in which WILLIS testified.

The introduction by the Government of WILLIS' Grand Jury testimony [R.-297] and a further introduction of the testimony of Agent Hahn and Detective Fielding to the effect that WILLIS had told them that JORDANO had told her that he was responsible for and involved in the robbery of the Yonkers Savings Bank was crucial to the conviction of the appellants. It was devastating testimony from law enforcement agents.

The only other witnesses to testify against the appellants in this case were HODGES and WILLIAMS, co-conspirators and accomplices, whose testimony is subject to the most careful scrutiny because of their position as accomplices. The cross-examination of HODGES and WILLIAMS left a record of the most unbelievable and astounding contradictions, lies and misstatements.

Therefore, it must be concluded that the evidence against the appellants, (without the testimony of Agent Hahn, Detective Fielding and WILLIS' Grand Jury testimony) would not, in and of itself be enough for a valid conviction. Certainly and undeniably, HODGES and WILLIAMS' testimony is weak; it is far, far from overwhelming evidence of guilt. U.S. v. Kaplan, (No. 1232 Sept. Term, 1973 2nd Cir., decided 10/15/74 Docket No. 74/1580).

Agent Hahn's and Detective Fielding's testimony and the Grand Jury testimony thus became crucial for a conviction. It represented the only independent third-party non-accomplice, non-conspiratorial corroborative testimony which would involve any of the appellants, in any way, with the crimes charged.

It is respectfully submitted that the WILLIS Grand Jury testimony and the testimony of Agent Hahn and Detective Fielding was the death knell for these appellants because of the overwhelming probability of the misuse of that testimony by the triers of fact in that the testimony was used not as it should have been, but as an improper foundation for a conviction. It was a death knell that should never have rung because this testimony should never have been allowed to come before the jury.

The sine qua non for the procedure used by the Government, namely, calling WILLIS, having her declared hostile and

thereafter impeaching her by her Grand Jury testimony and the testimony of Agent Hahn and Detective Fielding is that the Government must be (i) surprised by the testimony and (ii) affirmatively damaged by the testimony. U.S. v. Allsup, 485 F.2d 287 (8th Cir., 1973); Goings v. United States, 377 F.2d 753 (8th Cir., 1967); 3 Wigmore on Evidence §904, 1043 (3rd). At the very threshold, without surprise, and without affirmative damage the procedure of impeaching a witness in the manner done at this trial is improper regardless of whether or not limiting instructions with respect to the use of impeaching testimony is given. U.S. v. Allsup (supra); U.S. v. Goings (supra).

At the first trial, there was little or no reason for the Government to argue, which they did argue, that they were "surprised" by WILLIS' testimony. However, even at the first trial assuming arguendo that they were "surprised", there was no affirmative damage done by WILLIS' in Court testimony to allow the impeachment of her in the manner done by the Government.

In any event, at the second trial, there can be no rational, reasonable or credible argument that the Government was "surprised" at all by WILLIS' testimony, to say nothing of the fact that there was no affirmative damage done by her testimony.

Indeed, if there had been any question of surprise, the Court said at the very outset of the trial that the Government could not be surprised.

Judge Carter remarked on the record that:

> "Obviously the Government can't be surprised at that [WILLIS' testimony] because it already knows (emphasis supplied) that position." [R.-8]

It is impossible for the Government to claim surprise.

Nor was the Government damaged by WILLIS' testimony. WILLIS said nothing which would exculpate any of the appellants which would require impeachment of her by her prior Grand Jury testimony or by the testimony of Agent Fielding or Detective Hahn.

In the absence of the element of surprise or affirmative damage, it was totally improper to have WILLIS declared hostile and have her impeached by reading her Grand Jury testimony and thereafter allowing the testimony of Agent Hahn and Detective Fielding as to what she had told them JORDANO had told her about his involvement. U.S. v. Allsup, (supra); Goings v. U.S., (supra) Randazzo v. U.S., 300 F. 794 (8th Cir., 1924) U.S. v. Block, 88 F.2d 618 (2nd Cir., 1937); Young v. U.S. 214 F.2d 232 (D.C.Cir., 1954); Rosenthal v. U.S., 248 F.684 (8th Cir., 1918); U.S. v. Washabaugh, 442 F.2d 1127 (9th Cir., 1971).

The fact is that there was no good, valid, credible or believable reason that the Government should be "surprised" by the WILLIS' testimony. U.S. v. Block, (supra).

The real point is, and it is clear and obvious to any first year law student, that the whole and sole purpose of putting WILLIS on the stand with what had to be absolute knowledge by the Government beforehand, recognized to and informed of by the Court, that she would deny that she ever heard appellant JORDANO mention a bank messenger or state that he had been responsible for and involved in the bank robbery of the Yonkers Savings Bank was so that two law enforcement agents, Agent Hahn, and Detective Fielding, could be called to the witness stand to give affirmative evidence of the involvement of the appellants in the robbery. It is unquestionable that Agent Hahn's and Detective Fieldings' testimony was extremely potent and damaging to these appellants given the quantum of evidence produced by the Government in this case. It cannot be under any circumstance, considered just harmless error to have allowed Agent Hahn and Detective Fielding to have testified in the manner in which they testified at the trial. U.S. v. Allsup, (supra).

And, the potency of the testimony was not in its technical use, as the Court instructed, to impeach the credibility of WILLIS [R.-301] or to evaluate her as a

witness [R.-395] but in its overwhelming probable misuse by the jury as affirmative evidence that the appellants were, in fact, involved in the commission of the crime.

It is true that a limiting instruction was given to attempt to correct the danger of misuse by the jury, but it is respectfully submitted that in this case the limiting instructions did not suffice.

First, if the procedure was improper, as appellant respectfully contends that it was, then the limiting instruction does not cure improper procedure.

Second, there was a great danger that the limiting instruction here, namely, that the Grand Jury testimony and the testimony of Agent Hahn and Detective Fielding was to be considered on the question of the credibility of WILLIS was misused, because, while tangential, the credibility of WILLIS was not a material issue in the case. U.S. v. Kaplan (supra).

Thus, it is easy to understand, how the jury misused the testimony. It is true that a limiting instruction was given and the jury is supposed to follow instructions. U.S. v. Kaplan, (supra); Bruton v. U.S., 391 U.S. 123, 135 (1968), Lutwak v. U.S., 344 U.S. 604, 619 (1953); U.S. v. Bell No. 741391 (2nd Cir., July 17, 1974). But, there are limits upon the powers of jurors-or judges-or anyone to keep inter-

connective thoughts separate from each other. U.S. v. Kaplan, (supra).

In Kaplan the limiting instruction given by the Court was certainly much stronger, clearer and to the point than the limiting instruction given in the instant case and yet the Court in Kaplan (supra) held that the allowance of the testimony even with the limiting instruction was reversible because of the overwhelming potential of misuse of the testimony by the jury and the view that the limiting instruction does not cure the evil. U.S. v. Allsup, (supra); U.S. v. DeSisto, 329 F.2d 929 (CA 2 1964).

This case is certainly like Kaplan (supra) in that the only other testimony offerred in this case besides Agent Hahn's, Detective Fielding's and the Grand Jury minutes was accomplice testimony. This was a very close case. A previous jury was hung with respect to the guilt of these defendants on counts one, two and three and, as the record shows, badly hung. Thus, in this rather short trial, where all other testimony against the appellants was that of co-conspirators and accomplices, there was anoverwhelming significance to the testimony of two law enforcement agents.

Indeed, the prosecutor, in his summation, totally obliterated any limiting instructions when he stated that:

> "You [the jury] will have to decide whether she [WILLIS] had conversations with them [Agent Hahn and Detective Fielding] and whether she was telling them [Agent Hahn and Detective Fielding] the truth." [R.-934].

Thus, appellant argues that the entire procedure was improper. If improper, it cannot be cured by the limiting instruction. If the procedure is determined to be proper, the limiting instruction does not cure it because, in this type of case, the limiting instruction cannot cure the evil and damage caused by the testimony.

The error in allowing the testimony of Agent Hahn and Detective Fielding and the Grand Jury minutes cannot be deemed to be deminimus. The magnatude of the prejudice requires a new trial. Goings v. U.S., (supra).

Finally, the testimony of Agent Hahn, Detective Fielding and the Grand Jury minutes relates directly to this appellant. In the first place WILLIS' testimony before the Grand Jury which was read to the trial jury, concerning the conversation in the White Bridge Bar [R.-298] directly implicated the appellant in that WILLIS testified that the appellant was present at that conversation.

Second the testimony of Agent Hahn and the Dective Fielding, although not mentioning appellant by name, because of the admitted closeness of the appellant with his co-defendant brother JORDANO and the fact that all three appellants were linked to each other at every stage of this trial including prior unrelated employment and the testimony of MAFUCCI's alibi witness [R.-789] linked the three appellants,

was equally damaging to all appellants. They were all partners in various business and appellant testified that his relationship with JORDANO was close.

The testimony of Agent Hahn and Detective Fielding, if improper or if not cured by the limiting instructions cannot be under any rational test, be said to be selectively bad as to one appellant and admissible against the others. It was equally damaging to all three appellants. To separate out JORDANO as being the only party damaged by the introduction of this testimony would be, in light of the joint trial, and similarity of defenses, a total miscarriage of justice. Bruton v. U.S., (supra).

POINT II

IT WAS REVERSIBLE ERROR FOR THE COURT TO HAVE REFUSED TO ALLOW APPELLANT TO INTRODUCE INTO EVIDENCE THE COPY OF THE BILL RECEIVED BY THE APPELLANT AT THE JUNKYARD WHERE HE REPAIRED HIS CAR ON THE MORNING OF THE ROBBERY

Appellant JORDAN's alibi for the morning that the robbery was committed when he was allegedly driving the perpetrators to the scene of the crime was that he was repairing the radiator of his wife's car and on that morning had left his home and proceeded directly to an automobile junkyard. He purchased and installed a radiator, remaining until the late morning and thereafter returning home.

To substantiate his oral testimony, JORDAN offerred into evidence a xerox copy of the original bill which had

been xeroxed in his attorney's office [R.-711]. The original was returned to the appellant. Appellant further testified, that after xeroxing this copy and giving the copies to his attorney that he had put the original in his wallet but had lost his entire wallet including the original bill. [R.-711].

The copy that had been retained by his lawyer was offerred into evidence at the trial but refused at several junctures [R.-658, 659, 709, 717, 718, and 758].

It is axiomatic, and the cases are legion, that, since the original bill was unobtainable because it was lost, the xerox copy was the best evidence and that at once became admissable. The court was in plain error in refusing to allow the introduction of the xerox copy of the bill into evidence pursuant to the best evidence rule. U.S. v. Savage, 482 F.2d 1371 (9th Cir., 1973); Simpson v. U.S., 195 F.2d 721 (9th Cir., 1952); U.S. v. Manton, 107 F.2d 834 (2nd Cir., 1938); U.S. v. Tyson 470 F.2d 381 (D.C.Cir., 1972).

The loss or destruction of an original writing is a long standing basis for asserting unavailability. U.S. V. Savage, (supra); C. McCormick, Law of Evidence, §201 at 413 (1954); 4 J. Wigmore on Evidence §119398 (1972).

The next question that must be met is: Was the refusal to take this xerox copy into evidence so prejudicial as to require a reversal? Appellant strongly urges, that in con-

sideration with the other factors in this case as pointed out below, it most certainly is.

Again, it must be borne in mind that this was a close case. Appellant took the stand to testify in his own behalf; his was an alibi defense; he credibility to the jury was of the utmost importance. The documentation supporting the alibi defense was therefore crucial to the credibility of the appellant in asserting that defense.

The improper denial of the motion to introduce the xerox copy of the bill into evidence severely strained the credibility of the defendant before the jury in that documentation that appellant was vouching for was being excluded from evidence. The potential for harm that that error resulted in was incalcuable.

The prosecution made much, improperly, on summation when he could not be rebutted, of the time records supplied by the appellant with respect to his work hours on the evening before the robbery and the fact that nobody worked at the appellant's job site on weekends thus, minimizing the importance of appellant's, and his witnesses' contentions that he was required to have been on the job at all times to watch various gauges and regulate pumps to prevent the flow of water into the construction site at which he was employed. Another method is used during the weekends and

the proper procedure for the prosecutor was to have asked that question of the witnesses on cross-examination. The prosecutor also asked, although the offer to introduce of the xerox copy of the record had been refused, whether the appellant was aware of tests which could be made to determine when the document was written had the original been available. [R.-758]. The prosecution also made much of the fact that the junkyard owner was not called. [R.-941].

Thus, the Court's incorrect ruling, in light of these assaults on the credibility of the appellant, made that plain error much more important. The Court's incorrect ruling coupled with the above compounded appellant's position in that it created a serious and unwarranted credbility problem for the appellant in the eyes of the jurors.

This error, coupled with the errors with respect to the testimony of Agent Hahn and Detective Fielding combine to mandate a reversal of the judgment of conviction.

If the testimony of Agent Hahn and Detective Fielding and WILLIS' Grand Jury testimony had been properly excluded only accomplices testimony would have remained against the appellant. Had his credibility not been seriously damaged by the improper exclusion of an important segment of his documentary evidence, in a case this close, it is entirely probable that the verdict would have been otherwise. In any event, the error cannot be condoned as harmless.

III. CONCLUSION

For the foregoing reasons the judgment of conviction should be reversed.

Respectfully Submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CATHIE WEITEKAMP, being duly sworn. says:

I am not a party to this action; I am over 18 years of age; I reside at 150-18 128th Street, South Ozone Park, New York, 11420.

On March 21st, 1975, I served the within BRIEF FOR DEFENDANT-APPELLANT ANDREW JORDAN, upon PAUL CURRAN, United States Attorney, United States Courthouse, Foley Square, New York, New York; RICHARD SCANLAN, ESQ., Attorney for Defendant-Appellant ANTHONY MAFFUCCI, at 199 Main Street, White Plains, New York; and JAMES M. LaROSSA, ESQ., Attorney for Defendant-Appellant DANIEL JORDANO, at 522 Fifth Avenue, New York, New York, the addresses designed by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

Cathie Weitekamp
CATHIE WEITEKAMP

Sworn to before me this
21st day of March, 1975.

BENJAMIN J. GOLUB
Notary Public, State of New York
No. 24-1499475
Qualified in Kings County
Term Expires March 30, 1975